UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of:

LINCOLN LUTHERAN OF RACINE Case No. 30-CA-111099

And

SERVICE EMPLOYEES INTERNATIONAL UNION
HEALTHCARE WISCONSIN

REPLY BRIEF TO RESPONSE BRIEF OF LINCOLN LUTHERAN OF RACINE

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This brief is a Reply to the Response Brief dated October 10, 2014 of Lincoln Lutheran of Racine ("Lincoln Lutheran," or the "Employer").

1. In its Statement of Facts,[1] the Employer Incorrectly States That No One From the Union, Including Strauss, Objected Then or Later; This Assertion Contradicts Undisputed Facts in the Record and Fails to Acknowledge the Credibility Determinations Made by the Administrative Law Judge.

On February 18, 2013, the Employer's Vice President, Butch Patterson ("Patterson") told Strauss that Lincoln Lutheran proposed to suspend the arbitration, union security, and dues checkoff provisions of the agreement effective March 5, 2013.

Contrary to the Response brief, the hearing transcript reflects that Employer's Counsel asked Patterson whether there was "any response" from the union. Patterson's words in response were: "A: Not regarding the union dues." (Tr. 29:25-30:2.)

But Strauss did respond. She not only stated "that it was not a good way to have a good relationship," but also said that the message Patterson delivered "would not in any way, shape or form change the way that we would represent our members, nor would it change the way that we would approach the bargain. And then I asked him to reconsider their decision." (Tr. 20:8-14.) Patterson looked down. The management team got up and left the session. (Tr. 20:15-22.) Strauss objected to the entire message, which covered union security and arbitration as well as dues checkoff. The Employer's

[1] The Employer for brevity's sake adopts by reference the Statement of Facts in the Response Brief in Opposition to the General Counsel's Exceptions. The Union's brief responds to the printed text included there.

brief also neglects to mention that after Strauss requested reconsideration, the management team left without responding.[2]

The Employer further fails to mention that the next bargaining session on March 5, 2013, never occurred because Patterson cancelled it. (Tr. 26:11-12.)

The Employer states, "The next meeting occurred on March 14, 2013, but the Union did not raise the issue or object to the discontinuance of dues checkoff."[3] Its statement ignores that Management had not responded to the Union. Management continued dues checkoff after March 5, 2013, although it had said it would discontinue.

There was no other verbal discussion between the parties about dues check off. Tr. 23:3-7. The parties later agreed to a written stipulation that stated:

> 17. On March 14, 2013, the Union and Respondent held their sixth negotiation session in bargaining for a successor contract.
>
> 18. At the March 14, 2013 negotiation session, neither the Respondent nor the Union raised or discussed the subject of dues checkoff or the discontinuation of dues checkoff.
>
> 19. On March 18, 2013, by e-mail, Respondent stated the discontinuation (or termination) of dues checkoff would be effective on March 19, 2013. See Joint Exhibit 10 for the relevant e-mail.

(G.C. Ex. 1(k) ¶¶ 17, 18, 19). Management's failure to respond, combined with its on-again, off-again actions, failed to deliver any clear or consistent message. A review

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[2] In fact, ALJ Bogus stated, "When Patterson was asked whether there was any response from the Union to his statement that the Respondent would cease honoring the arbitration, union security, and dues check off provisions, he testified "not regarding the union dues." This nonspecific testimony does not directly contradict Strauss' testimony because Strauss did not claim that she explicitly mentioned union dues. Patterson was not asked to recount exactly what Strauss said to him at the end of the meeting or to confirm or deny Strauss' testimony about what she said." ALJ Bogus found both witnesses credible and also found that they did not directly contradict. ALJ Dec. p. 3, FN 5

[3] Lincoln Lutheran of Racine's Response Brief in Opposition to the General Counsel's Exceptions, Statement of Facts, p. 2.

of all of these facts, not just those in the Response brief Statement of Fact, makes clear that no waiver nor acquiescence by the Union occurred.

2. Lincoln Lutheran Should Have Been Aware That Relying on *Bethlehem Steel* and Its Progeny Was Risky After the December 2012 holding in *WKYC-TV*; That Reasoning Now Appears to Have Been Followed By the Fully Constituted Board In Its Holding in *Healthbridge Management, LLC*.[4]

In *Healthbridge*, an employer was accused of violating federal labor law when, among other things, it unilaterally discontinued dues check-off after the parties' collective bargaining agreement had expired. The matter was tried by an administrative law judge on July 20, 2012; then after filing of exceptions and briefs, cross-exceptions and briefs, and answering and reply briefs, the Board granted authority to a three member panel. Relying on *Bethlehem Steel*, with regard to dues deduction, the administrative law judge had found that the Respondent did not violate Section 8(1)(5) and (1) of the Act.[5] However, after he issued his decision, the Board overruled *Bethlehem Steel* and its progeny to the extent that they stood for the proposition that dues checkoff does not survive contract expiration.[6] The Board then wrote in *Healthbridge*:

> We held in *WKYC-TV* that 'an employer, following contract expiration, must continue to honor a dues-checkoff arrangement established in that contract until the parties have either reached agreement or a valid impasse permits unilateral action by the employer.' We also decided, however, to apply the new rule prospectively only. Thus, as in *WKCY-TV*, we shall apply *Bethlehem Steel* in the

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[4] *Healthbridge Management, LLC*, 360 NLRB No. 118, slip op. at 3, (May 22, 2014).

[5] About five months before the decision in *WKYC-TV*, the administrative Law Judge in *Healthbridge* wrote in a footnote to his July 12, 2012 decision that, "The General Counsel concedes that *Bethlehem* represents the current law on this issue, but argues that that case should be overruled. The Board may do so, but I cannot. "It is a judge's duty to apply established Board precedent which the Supreme Court has not reversed." *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984) *citing Iowa Beef Packers Inc.* 144 NLRB 615, 616 (1963); *Pathmark Stores*, 2342 NLRB 378 fn 1.

[6] *WKYC-TV*, 359 NLRB No. 30, slip op. at 10 (2012).

> present case. Accordingly, we adopt the judge's finding that, because the Respondent was privileged under *Bethlehem Steel* to cease honoring the dues-checkoff arrangement after the expiration of the parties' collective-bargaining agreement, the Respondent did not violate the Act as alleged.

Healthbridge, at 3-4. Although the Board appeared to adopt the reasoning of *WKYC-TV*, with regard to dues deduction, it did not articulate its reasons beyond the quoted text above. Completely independent of the specific holding in *WKYC-TV*, its reasoning is sound.[7] However, the Board needs to clearly articulate the reasoning.

In *Lincoln Lutheran*, the Board should follow the same reasoning as in *WKYC-TV*, but a different result regarding remedy is appropriate. By the time Lincoln Lutheran ceased dues check-off on March 19, 2013, *WKYC-TV* had been decided, and the Employer, consulting regularly with its attorney,[8] should have been well aware before March 19, 2013, that the Board had changed direction. The Employer cannot claim surprise.

Also, the Employer should have known even before ceasing dues check-off on March 19, 2013, that, given precedent in the Seventh and D. C. Circuits, protracted litigation was possible, and even likely, if it ceased dues deduction, given the reasoning

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[7] Significantly, since the Board decision in *Healthbridge* in May 2014, the Union is aware of one Administrative Law Judge decision, in *Aerostar Development, Inc. D/B/A/ Pajaro Valley Golf Club, Case 32-CA-111385* (June 12, 2014), in which the Administrative Law Judge not only followed the reasoning of *WKYC-TV* regarding dues, but also provided a remedy. In *Aerostar*, unlike *Healthbridge*, the remedy listed was not just prospective. On July 12, 2014, the matter was transferred to and continued before the Board in Washington D.C. pursuant to the Board's practice. No exceptions having been filed, and the time for exceptions having passed, on July 29, 2014, the Board adopted the findings and conclusions of the Administrative Law Judge as contained in his decision. While the *Aerostar* decisions are not published, nor are they precedential for the parties in *Lincoln Lutheran*, their existence makes clear that at least one Administrative Law Judge must have concluded, using the standards stated in *Healthbridge*, that he was following the direction of the constituted Board, as he was required to do. *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984) *citing Iowa Beef Packers Inc.* 144 NLRB 615, 616 (1963); *Pathmark Stores*, 2342 NLRB 378 fn 1.

[8] GC Ex. 1(k) at 12, Jt. Ex 8, and GC Ex 1(l) at 5; GC Ex 1(k) at 16; GC Ex 1(k); Jt. Ex 10.

already adopted in *WKYC-TV*. By electing to cut off dues deduction under these circumstances, the Employer was assuming risk.[9]

The constituted Board has signaled that it will after *Noel Canning*[10] follow a different approach than that taken regarding dues deduction in *Bethlehem Steel.* Thus, because of precedent set many years ago in *U.S. Can Co. v. N.L.R.B.*, 984 F.2d 864 (7th Cir. 1993) or *McClatchy Newspapers Inc. v. N.L.R.B.*, 131 F.3d 1026, 1030 (D.C. Cir. 1997), both of which follow *Bethlehem Steel,* the precedent in the Seventh and D.C. Circuits on the issue of dues deduction is ripe for reconsideration.

The debate that could be foreseen in March 2013 is now before the Board. It is essential that the Board clearly articulate its reasoning regarding dues deduction. The reasoning articulated in *WKYC-TV* should be followed. For all of the reasons explained above, the process established under sec. 10(f) of the Act should proceed. No reason exists to dismiss the Union's complaint.

3. Assertions in the Employer's Response Brief that Dues Checkoff Grows Out of a Contractual Arrangement Between the Union and Employer That Expires with the Underlying Contract is Both Factually Wrong and Legally Incomplete.

The Employer begins by saying on page 2 of its brief that, "The Union believes that because § 302(c)(4) does not mention a contract, dues checkoff is not contractual in nature and is merely an 'administrative convenience' for the union." However, the Union does not make that argument. On pages 10 - 12 of its Brief in Support of Exceptions to Administrative Law Judge's Decision, the Union merely argued that dues

[9] Sec. 10(f) of the Act describes the process in 29 U.S.C. §160(f).
[10] *N.L.R.B. v. Noel Canning*, 134 S. Ct. 2550 (2014).

check off was an administrative convenience. It does not argue that it was an administrative convenience for the Union nor for unions generally, nor did it exclude the employer.

A dues check off clause may be more properly viewed as an administrative convenience to all involved: the employer, the employee, and the union. Both unions and employers find it mutually advantageous to agree to dues check off. Testimony given before the 80th Congress in 1947 regarding dues check off with and without security clauses indicated that dues check-off had clear advantages for the Employer as well as for Unions:

> Speaking on the mutual advantages of check-off for employers and unions, CIO General Counsel Pressman testified before the Senate Labor committee that "most employers . . . prefer the check-off with or without union security to union security without the check-off [as] indicated by the issue which has been posed with some frequency in recent months in collective-bargaining negotiations in which the employer has offered a universal check-off in preference to union security, contending that he [the employer] prefers the relatively easy, automatic, mechanical process of the check-off to being forced to deal with problems relating to discharge of recalcitrant individual employees.

Electrical Workers IBEW Local 2088 (Lockheed Space Operations), 302 NLRB 322, 326 fn. 14 (1991). Congress ultimately placed the dues check off language in LMRA § 302(c)(4), a completely separate section of the law, not connected with union security clauses.

It resolved issues of mandatory or non-mandatory dues check-off in favor of a completely voluntary dues checkoff.[11] Employers "cannot be required to authorize dues checkoff as a condition of employment" even where a union security agreement

[11] *WKYC-TV* at 7.

exists.[12] Sec. 302(c)(4) of the LMRA permits parties to make dues-checkoff authorization irrevocable for one year from the execution date or until contract expiration, whichever period is shorter. After the one-year period, authorization is revocable during an "escape period," which is usually a ten-to twenty day window immediately after the irrevocability period expires.[13] The irrevocability period can be worded to apply to members, non-members, and to members who authorize dues deductions, but resign employment during the applicable time period.[14]

Dues checkoff authorizations allow employees to elect to deduct monies from their pay checks to cover the cost of union dues, as a matter of administrative convenience. Unions are relieved of the burden of chasing down late payers and employees are relieved of manually paying dues each month. In addition, it removes the inefficiency and disruption that would occur for the employer if shop stewards sought to collect union dues on company property or even on company time.[15]

On page 3 of its Response Brief, the Employer claims, "And if the obligation [to deduct dues] arises solely from the contract, it expires with the contract as well." The Employer's assertion is wrong. The dues deduction obligation arises not only from contract, in some instances, but also from the law in § 302(c)(4), and from the voluntary choice of the employee to provide a written authorization.

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[12] Id.
[13] Brian A. Powers & Andrew Kelser, *Dues Checkoff Dreams Do Come True, They Do, They Do*, 29 ABA J. Lab. & Empl. L 299, 302-303 (2014), and cites therein.
[14] *Id*, at 303, citing *NLRB v. U.S. Postal Serv., 833 F.2d 1195, 1197 (6th Cir. 1987)*, decision supplemented, 837 F.2d 476 (6th Cir. 1988).
[15] *Id.*, at 302.

In *WKYC-TV,* the Board offered specific reasons for finding that Congress contemplated that dues checkoff would survive contract expiration. First, the language of the statute itself makes clear that Congress treated dues checkoff and union security clauses differently:

> The language of the Section 8(a)(3) proviso makes clear that when Congress wanted to make an employment term, such as union security, dependent on the existence of a contract, Congress knew how to do so. Yet Section 8(a)(3) does not mention dues checkoff, let alone limit the effectiveness of a dues-checkoff provision to the life of a collective-bargaining agreement. And, as we have shown, both the language and the legislative history of Section 302(c)(4) unambiguously indicate that Congress contemplated that dues checkoff would survive contract expiration.

WKYC-TV at 6. Section 302(c)(4) contains no language making dues-checkoff arrangements dependent on the existence of a collective bargaining agreement. The only document necessary for a legitimate dues-checkoff arrangement, under the unambiguous language of § 302(c)(4) is a written assignment from the employee authorizing deductions.[16] Nothing in § 302(c)(4) suggests that Congress intended to permit employers to unilaterally revoke checkoff arrangements.[17]

An employer must continue in effect contractually established terms and conditions of employment that are mandatory subjects of bargaining, until the parties either negotiate a new agreement or bargain to a lawful impasse. [18] This status-quo rule, established in *NLRB v. Katz,* 360 U.S. 736, 742-743 (1962) applies to dues-checkoff.[19] The Board reasoned that a limited number of mandatory subjects of bargaining,

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[16] *WKYC-TV* at 4.
[17] *Id., and cites in fn. 17.*
[18] *WKYC-TV* at 2.
[19] *WKYC-TV* at 3.

including arbitration provisions, no-strike clauses, and management-rights clauses do not survive contract expiration. In agreeing to each of these arrangements, parties have waived rights that they otherwise would enjoy. Such waivers are presumed to not survive the contract. But that is not the case with dues checkoff:

> Unlike no-strike, arbitration, and management-rights clauses, a dues-checkoff arrangement does not involve the contractual surrender of any statutory or nonstatutory right. Rather, it is simply a matter of administrative convenience to a union and employees whereby an employer agrees that it will establish a system where employees may, if they choose, pay their union dues through automatic payroll deduction.

WKYC-TV at 4. Thus, the Employer's positions that dues checkoff arrangements expire with the underlying contract, and that the decision in *Bethlehem Steel* must be reaffirmed, must fail.

4. The Employer's proposal that if the Board were to again overturn *Bethlehem Steel*, that decision should apply prospectively only, is unnecessary.

The Board's usual practice is to apply new policies and standards retroactively "to all pending cases in whatever stage," unless retroactive application would work a "manifest injustice."[20] In 2012, the Board considered that retrospective application of a change in its position on *Bethlehem Steel* might be challenging, after so many years of precedent, albeit wrongly decided. It therefore applied the decision prospectively only.[21] Today, however, the parties have known since 2012 that a change might occur. The Board should reaffirm the reasoning expressed in *WKYC-TV* and should follow its usual policy by applying the policies and standards in its decision retroactively.

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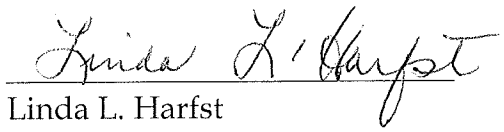
[20] *SNE Enterprises*, 344 NLRB 673, 673 (2005).
[21] *WKYC-TV* at 9 and sites therein.

CONCLUSION

For all of the reasons stated above and in the Union's prior Brief in Support of Exceptions, the Board should adopt the reasoning it expressed in *WKYC-TV*. The facts expressed in the record should be corrected as indicated in this brief; the Union's Complaint should be upheld; and the resulting decision applied retroactively.

Dated at Madison, Wisconsin this 23rd day of October, 2014.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Heidi K. Buttchen, hereby certify that a copy of the Reply Brief to Response Brief of Lincoln Lutheran of Racine in the above-captioned matter was served by email to Angela B. Jaenke, on behalf of General Counsel; John H. Zawadsky, on behalf of the Respondent; and John Raudabaugh on behalf of Amicus Curiae National Right to Work legal Defense Foundation, Inc., on October 23, 2014.

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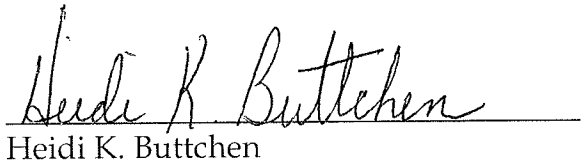

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